In the

Supreme Court of the United States

October Term of 1967
No. 486

J. DAVID STERN,
Appellant

vs.

SOUTH CHESTER TUBE COMPANY,
Respondent

APPENDIX

DAVID FREEMAN,
RICHARD H. WELS,
Attorneys for Appellant.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 31,033

J. David Stern,
Plaintiff

and

Sophie L. Siegel,
Intervenor

vs.

South Chester Tube Company,
Defendant

I.

RELEVANT DOCKET ENTRIES

Date

1962

Feb. 20, Complaint filed.

Apr. 10, Answer filed.

Docket Entries

1963

Apr. 5, Order of Court Denying motion of J. D. Stern for summary judgment under Rule 56 filed. 4-8-63 noted and copies mailed. RCB

1965

Jan. 6, Defendant's motion to dismiss filed.

May 12, Nonjury Trial. Witnesses sworn. JMD

1966

Mar. 21, Opinion, Davis, J. and Order Granting deft's. motion to dismiss the complaint for lack of jurisdiction over the subject matter filed. 3-22-66 entered and notice mailed. JMD

Apr. 1, Order of Court amending footnote 2 of the opinion of March 21, 1966 filed. 4-4-66 entered and copies mailed. JMD

II.

COMPLAINT

1. Jurisdiction is founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of New York. Defendant, South Chester Tube Company, is a corporation duly incorporated under the laws of the State of Pennsylvania, engaged in business and maintaining an office for the conduct of its business in the County of Delaware, State of Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Defendant owns all the capital stock of, and completely controls the following corporations:

(a) Chester Tidewater Terminal, Inc., a corporation duly incorporated under the laws of the State of Pennsylvania.

(b) Dodge Steel Company, a corporation duly incorporated under the laws of the State of Pennsylvania.

(c) South Chester Corporation, a corporation duly incorporated under the laws of the State of Delaware.

(d) Lion Fastener Company, Inc., a corporation duly incorporated under the laws of the State of Delaware.

3. All of the aforesaid companies are engaged in business within the State of Pennsylvania and within the jurisdiction of this Court. All of the records of the aforesaid companies are located within the jurisdiction of this Court.

4. Plaintiff is the owner of 62 shares of the capital stock of the defendant. The value of said stock is in excess of the sum of $10,000.00.

5. Plaintiff has often requested permission of defendant to inspect its share register, its books of account and records of account, the records of proceedings of its shareholders and directors, and the books and records of account of its subsidiaries, but the defendant has always refused to permit such inspection.

6. Plaintiff has requested such inspection and now seeks such inspection in order to ascertain:

(a) the holdings of the corporation.

(b) the exact value of his holdings in the corporation.

(c) whether the affairs of the corporation were and are properly conducted.

(d) whether proper dividends are being paid by the corporation.

7. Plaintiff seeks inspection especially because:

(a) the information furnished by the defendant has been insufficient to disclose its true financial condition.

(b) the company has paid the same dividend of $10.00 per share for the past seven years, although its holdings and operations have greatly increased.

(c) the District Director of Internal Revenue for the Eastern District of Pennsylvania has caused proceedings to be instituted under section 102 of the Internal Revenue code of the United States against the defendant for the collection of taxes on undistributed profits of the defendant corporation.

Wherefore, plaintiff requests that this Court order the defendant to permit plaintiff to examine the share register, the books of account and records of the defendant, the records of proceedings of its shareholders and directors, and the books and records of account of its subsidiary corporations.

David Freeman
Attorney for Plaintiff

III.

ANSWER

Answering the averments contained in the complaint, defendant South Chester Tube Company by its attorneys replies thereto in accordance with the numbered paragraphs thereof as follows:

1. It is admitted that plaintiff avers that jurisdiction is founded on diversity of citizenship and amount in controversy, and it is further admitted that defendant is a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania. Defendant is without sufficient information or knowledge to form a belief as to the citizenship of plaintiff and as to whether the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000, and it therefore denies said averments and demands proof thereof at trial.

2. It is admitted that defendant owns all of the outstanding capital stock of the corporations listed in subparagraphs (a), (b), (c), and (d), but it denies the conclusion that it completely controls those corporations; to the contrary, those corporations, each of which operates as a separate entity producing separate products at separate locations, are managed and controlled by their respective board of directors and officers.

3. It is admitted that defendant and the other corporations listed in paragraph 2 of the complaint are engaged in business within the Commonwealth of Pennsyl-

vania and that all of the records of those corporations, with the exception of those of Lion Fastener Company, Inc., the facilities of which are located in New York State, are located within the Commonwealth of Pennsylvania; the records of Lion Fastener Company, Inc., are located in both Pennsylvania and New York.

4. It is admitted that plaintiff is the record owner of 62 shares of the capital stock of defendant; it is admitted that the aggregate value of said shares is in excess of $10,000, but it is denied that the value thereof is relevant or material to this proceeding.

5. The averments of paragraph 5 of the complaint are denied. From time to time plaintiff or his agents have requested permission of defendant to inspect certain records of defendant and the corporations listed in paragraph 2 of the complaint, but it is denied that defendant has always refused to permit such inspection. To the contrary, defendant has permitted plaintiff or his attorney or both to examine and make extracts from all records of defendant which plaintiff as a shareholder is entitled to inspect under the laws of Pennsylvania. The two most recent inspections took place on November 30, 1961 in New York City where, at the request of plaintiff, an officer of defendant made available to plaintiff's attorney certain basic data regarding defendant and its subsidiaries from which plaintiff could have determined any information he requires, and on March 7, 1962, in Philadelphia, Pennsylvania, at the annual meeting of shareholders of defendant, at which time plaintiff's attorneys once again inspected the list of shareholders of defendant. Several days prior to said annual meeting, defendant mailed to plaintiff and all other shareholders the annual report of defendant for

1961, a copy of which is attached hereto, made a part hereof and marked Exhibit "A".

6. It is admitted that plaintiff has averred his request for inspection and the alleged purposes therefor as set out in paragraph 6 of the complaint, but it is denied that any inspection in addition to that already made by plaintiff or on his behalf is necessary to achieve the purposes listed. It is further denied that the purposes listed are the true purposes of defendant.

7. It is admitted that in the second paragraph numbered "6" in plaintiff's complaint plaintiff claims to seek inspection.

(a) It is denied that the information furnished by defendant has been insufficient to disclose its true financial condition.

(b) It is admitted that defendant has paid the same dividend for the past seven years. The implication in the complaint that defendant's earnings have steadily increased during that period is denied; to the contrary, earnings have fluctuated throughout the period, and dividend payments have been maintained in a manner deemed by defendant's Board of Directors to be most beneficial to defendant and its shareholders.

(c) It is denied that any formal proceedings have been instituted against defendant or any of its subsidiaries by the Internal Revenue Service under Section 102 of the Internal Revenue Code of 1939, its successor sections (531-535) of the Internal Revenue Code of 1954, or any other section of either code. In

1961, a representative of the office of the Philadelphia District Director of Internal Revenue proposed the determination of a deficiency under Section 531 of the Internal Revenue Code of 1954 against one of defendant's subsidiaries; after conferences with a superior officer of the Internal Revenue Service the proposal was withdrawn.

SEPARATE DEFENSES

First Defense

The Court lacks jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

Plaintiff's demand for inspection of defendant's books of account and other records is not made in good faith or for a reasonable purpose.

Wherefore, defendant requests that the complaint be dismissed and judgment entered in favor of defendant with costs according to law.

(s) Richard P. Brown, Jr.
(s) Ralph Earle, II
Attorneys for Defendant

Of Counsel:

Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia
Trust Building
Philadelphia 9, Pennsylvania

[Exhibit Omitted.]

IV.

MOTION TO DISMISS

Defendant moves the Court to dismiss this action on the ground that the Court lacks jurisdiction over the subject matter, for the following reasons:

1. The only relief sought in this diversity action is an order to compel the defendant company to allow the plaintiff, a minority shareholder, to inspect certain corporate records. Such an order is in the nature of a writ of mandamus. Under the All Writs Act, this United States District Court does not have jurisdiction to issue an order in the nature of a writ of mandamus in a case in which that writ is the only relief sought.

2. The only factual averment in plaintiff's complaint regarding the existence of the jurisdictional amount is the averment that plaintiff owns 62 shares of stock in the defendant company and that the value of said stock is in excess of the sum of $10,000.00. The value of those shares, however, is not the amount in controversy in this litigation. The amount in controversy must be measured by the value of the right which plaintiff seeks to enforce, to wit, the right of inspection of the corporate records of the defendant company. That right of inspection is not subject to any monetary valuation. Since diversity jurisdiction depends upon the existence of an amount in controversy which is capable of such monetary valuation, no jurisdiction exists in this Court.

Richard P. Brown, Jr.
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pennsylvania
Attorney for Defendant

Of Counsel:
Morgan, Lewis & Bockius

V.
OPINION

Davis, J. March 21st, 1966

The plaintiff stockholders have instituted this diversity action solely to compel the corporate defendant to permit them "to examine [its] share register, [its] books of account and records, the records of the proceedings of its shareholders and directors, and the books and records of account of its subsidiary corporation."

The matter now before the court is the defendant's motion to dismiss the complaint for lack of jurisdiction over the subject matter. The defendant contends first of all that the United States District Court has no power to grant relief solely in the nature of a Writ of Mandamus and secondly that the matter in controversy does not exceed the jurisdictional amount of $10,000. Because of the court's decision on the first ground, it will be unnecessary to reach the second.

Since the early years of our Republic, the United States Supreme Court and the inferior federal courts have interpreted the jurisdictional statute, now 28 U.S.C. §1332[1]

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[1] (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

and the All Writs Act now 28 U.S.C. §1651,[2] as denying to what are now the Federal District Courts the right to issue a writ of mandamus or a writ in the nature of mandamus unless it is ancillary to some other relief sought. Knapp v. Lake Shore & Michigan Southern Railway, 197 U.S. 536 (1905); Rosenbaum v. Bauer, 120 U.S. 450 (1887); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); McIntire v. Wood, 11 U.S. (7 Cranch) 503 (1813); Marshall v. Crotty et al., 185 F. 2d 622 (1st Cir. 1950); Fineran et al. v. Bailey, 2 F. 2d 363 (5th Cir. 1924); Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813 (D. Mass. 1960); United States ex rel. Barmore v. Miles, 177 F. Supp. 172 (W.D. Mich. 1959); Robert Hawthorne, Inc. v. United States Department of Interior, 160 F. Supp. 417 (E.D. Pa. 1958); Rosen v. Alleghany Corp., 133 F. Supp. 858 (S.D. N.Y. 1955). See "Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts; A Study in Procedural Manipulation", 38 Colum. L. Rev. 903 (1938).

In McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), the plaintiff brought a diversity action for a writ of mandamus against a register of the United States land office in Ohio to compel him to deliver certain documents of title. Although the plaintiff argued that the existence of diversity of citizenship was sufficient to allow the adjudication of the suit in federal court, the decision of the Supreme Court was to the contrary. It held that the trial

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[2] The All Writs Act provides that the lower federal courts:

"May issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

court had no power over a pure mandamus proceeding because the writ of mandamus was not "necessary for the exercise of its jurisdiction" under the All Writs Act and could not be used as a basis to obtain jurisdiction not already possessed. The Court asserted:

> "It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below, but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land office, or the party cannot sue.
>
> "[The All Writs Act] could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists and now where it is to [be] courted or acquired, by means of the writ proposed to be sued out."

In Rosenbaum v. Bauer, 120 U.S. 450, 456-57 (1887), a diversity case where the right of action rested on a state statute as in the case at bar, the Supreme Court specifically asserted that the All Writs Act restricted that the federal trial court's diversity jurisdiction over "all suits of a civil nature at common law or in equity" by "oper-at[ing] to prevent original cognizance . . . of a proceeding by *mandamus* not necessary for the exercise of a jurisdiction which had previously otherwise attached." See also Knapp v. Lake Shore & Michigan Southern Railway Co., 197 U.S. 536, 541-42 (1905); McIntire v. Wood, 11 U.S. (7 Cranch) 503, 504 (1813) . . . Although 28 U.S.C. §1332(a) now reads that the district courts have jurisdiction of

"all civil actions" with certain exceptions not relevant here, these words were merely substituted for the earlier wording in order to conform to the language of Rule 2 of the Federal Rules of Civil Procedure. They do not in any way change the meaning of the earlier phraseology. Rosen v. Alleghany Corp., 133 F. Supp. 858 (S.D. N.Y. 1955).

Whether the relief sought is in the nature of a writ of mandamus must depend on the historical use of the writ at the time of the enactment of the jurisdictional statute and the All Writs Act and not on the particular appellation given to the remedy or relief afforded by the state law which would otherwise apply to the case. The federal statutes restrict the mandamus power of the district courts and a state's characterization of the form of the cause of action or relief can hardly expand or limit the courts' jurisdiction. See Rosenbaum v. Bauer, McClung v. Silliman, McIntire v. Wood, supra. In any event, the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus. Sprang v. Wertz Engineering Company, 382 Pa. 48, 51, 114 A. 2d 143 (1955); Taylor v. Eden Cemetery Co., 337 Pa. 203, 10 A. 2d 573 (1940); Hodder v. George Hogg Co., 223 Pa. 196 (1909); 5 Fletcher, Cyclopedia Corporations, §§2250-2252 (Rev. ed. 1952).

Whatever the merits or demerits of the interpretation given to statutes 28 U.S.C. §1332 and the All Writs Acts, the courts have adhered to this restriction on their power even though one decision characterized it as "an outworn technicality." Marshall v. Crotty, 185 F. 2d 622, 627 (1st Cir. 1950). In 1962, the Congress took cognizance of this

recognized limitation[3] and passed a statute, 28 U.S.C. §1361, providing the district courts with jurisdiction in mandamus actions against officials of the United States government. However, it did not broaden the act to include such actions against private persons or corporate officers and to this extent the previous decisional law stands.

A number of relatively recent cases which have faced the identical issue now before this court have held that the federal district courts do not have the power to compel a defendant corporation to allow a shareholder to examine its books and records since the relief sought is in the nature of mandamus. Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813, 814 (D. Mass. 1960); Selman v. Colborn, 143 F. Supp. 112, 113 (S.D. N.Y. 1956); Breswick & Co. v. Briggs, 136 F. Supp. 301, 303-04 (S.D. N.Y. 1955); Rosen v. Alleghany Corp., 133 F. Supp. 858, 864-65 (S.D. N.Y. 1955). These cases are controlling of the instant action.

Nevertheless, the plaintiff relies on Hertz v. Record Publishing Company, 219 F. 2d 397 (3d Cir. 1955), cert. denied 349 U.S. 912 for the proposition that the federal district courts have such jurisdiction. In that case, one plaintiff had sold 150 shares of stock of the defendant corportion to the other plaintiff. They brought suit to compel the defendant to issue a stock certificate to the plain-

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[3] S. Rep. No. 1992, 87 Cong., 2d Sess. 2784 (1962); See Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479 (1962); "Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts; A Study in Procedural Manipulation", 38 Colum. L. Rev. 903 (1938).

tiff vendee, an act which the defendant had refused to perform on the ground that the plaintiff vendor had not been the owner of the stock and thus could not transfer what he did not own. The corporation made the argument that the court lacked jurisdiction because a writ of mandamus was the relief sought. The court held, however, that the action was really one in equity to determine title to the stock and that any issuance of a writ of mandamus would only be an aid to the adjudication of that matter.

The case at bar is not analogous to Hertz, for all that is requested here is the right to scrutinize the books and records of the defendant where the traditional remedy has been mandamus. Unlike Hertz, there is no other claim before this court to which any relief in the nature of mandamus might be ancillary.

The undersigned is not unmindful of the very recent decision of The Susquehanna Corporation v. General Refractories Co. et al., C.A. No. 39616, E.D. Pa., February 14, 1966, aff'd per curiam, No. 15787 and 15791, 3d Cir. Mar. 2, 1966 (Hastie, J., dissenting), where a corporation was enjoined from holding a stockholders' meeting unless and until the plaintiff stockholder had been allowed to scrutinize its books and records. There, however, the court specifically found that the remedy of mandamus, being at law, was inadequate due to the imminence of the meeting at which the stockholders were to vote upon a certain transaction that the plaintiff opposed. The court then invoked its equitable powers because of insufficiency of the legal remedy. The case at bar is clearly distinguishable since no such urgency or danger of irreparable harm is alleged and there is no showing that the remedy of mandamus is inadequate.

Finally the plaintiff argues that if this court has no mandamus power in this case the only forum in which this action can be brought are the courts of Pennsylvania, a result, it is contended, that would undermine the doctrine of Erie v. Tompkins, 304 U.S. 64 (1938), Guarantee Trust Co. v. York, 326 U.S. 99 (1945), and their progeny. The short answer to this contention is the right of Congress to restrict as it sees fit the diversity jurisdiction and remedies of the inferior federal tribunals. The cases talk in terms of this kind of a limitation imposed by Congress on the power of the federal courts to issue mandamus so that the doctrine of Erie v. Tompkins, which presupposes jurisdiction, has no effect on this restriction. See Knapp v. Lake Shore Railway, 197 U.S. 536, 542 (1905); McIntire v. Wood, 11 U.S. (7 Cranch) 503, 504 (1813).

While this court would agree that the limitation upon its power to grant a remedy in the nature of mandamus is an unrealistic anomaly, any change in the law is a matter for the Congress and not this Court. The great weight of precedent especially from the Supreme Court controls our decision, and we must, albeit, reluctantly, dismiss the complaint.

By the Court,
John Morgan Davis
J.

ORDER

And Now this 21st day of March 1966, it is hereby Ordered that the defendant's motion to dismiss the Com-

plaint for lack of jurisdiction over the subject matter be Granted.

By the Court,
John Morgan Davis
J.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15901

J. DAVID STERN and SOPHIE L. SIEGEL,*
Appellants

v.

SOUTH CHESTER TUBE COMPANY,
Appellee

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Argued November 3, 1966

Before Ganey, Smith and Freedman, *Circuit Judges.*

VI.

OPINION OF THE COURT

(Filed May 25, 1967)

By Smith, *Circuit Judge.*

This appeal is from the dismissal of a complaint in which the only relief sought by the appellant was the en-

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* This appellant has withdrawn from the litigation.

forcement of his statutory right as a stockholder to examine the books and records of account of the corporate appellee and its subsidiaries. Business Corporation Act, 15 P.S. §2852-308B. The right is enforceable in an original action of mandamus in the court of common pleas of the county in which the corporation has its principal place of business. 12 P.S. §1911; Goldman v. Trans-United Industries, Inc., 171 A. 2d 788 (Sup. Ct. Pa. 1961). Similar actions are not maintainable in the federal courts because of the limit on their jurisdiction.

Although the writ of mandamus has been abolished by the Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A., the procedural relief available in lieu thereof is still governed by the "All Writs Act", 28 U.S.C.A. §1651. The statute provides that the federal courts "may issue all writs necessary or appropriate In Aid of Their Respective Jurisdictions and agreeable to the usages and principles of law." (Emphasis added.)

It has been uniformly held in a long line of decisions that a federal court is without authority to issue a writ of mandamus except in aid of its jurisdiction already acquired under an applicable federal statute. Knapp v. Lake Shore Railway Co., 197 U.S. 536, 541-543 (1905); Covington Bridge Co. v. Hager, 203 U.S. 109, 111 (1906); Marshall v. Crotty, 185 F. 2d 622, 626 (1st Cir. 1950). There are other cases in point but we see no reason to cite them in this opinion. The relief here sought by the plaintiff is plainly not ancillary to a suit now pending in the district court. The issuance of the writ would not be in aid of the lower court's jurisdiction; it would simply terminate the litigation.

The defendant argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under §1332(a) of 28 U.S.C.A. is limited to "civil action".[1] Albanese v. Richter, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. Insular Police Commission v. Lopez, 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; Marshall v. Crotty, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the "All Writs Act," supra, and this is subject to the restrictions of the statute. It was held in Knapp v. Lake Shore Railway Co., supra, that an earlier counterpart of the present statute did not "confer power on the [lower] courts to issue mandamus in an original proceeding."

We recognize that a federal court may enforce a state-created substantive right, and to do so fashion an appropriate remedy. Cf. Guaranty Trust Co. v. York, 326 U.S. 99, 105-107 (1945). However, we are not here concerned with the question of remedy but one of jurisdiction. The general jurisdiction of the district courts is limited and defined strictly by statute, in this case by

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. Marshall v. Crotty, supra, 627.

§1651(a) of Title 28 U.S.C.A., supra. United States v. First Federal Savings & Loan Ass'n., 248 F. 2d 804 (7th Cir. 1957), cert. den. 355 U.S. 957. When thus limited and defined it cannot be extended by local statute. "The basic purpose of §1651, and of its statutory predecessors, was to assure to the various federal courts the power to issue appropriate writs . . . of an auxillary nature in Aid of Their Respective Jurisdictions as Conferred by other provisions of the law." (Emphasis added). In Re Previn, 204 F. 2d 417, 418 (1st Cir. 1953). It seems to me that the issuance of a writ of mandamus in this case would violate the plain statutory limitation on the lower court's jurisdiction.

The judgment of the district court will be affirmed.

Judge Freedman concurs in this opinion.

Ganey, *Circuit Judge*, dissenting.

In this country federal jurisdiction was originally vested in the courts of the United States under the Judiciary Act of 1789. By the Eleventh Section thereof the courts of the United States were vested with original jurisdiction of "all suits of a civil nature at common law or in equity" where the amount in dispute exceeded the sum of $500 and the parties were citizens of different states. Present jurisdiction is vested under 28 U.S.C.A. §1332(a)(1) in which, under the 1948 revision of this section, the words "civil action" were substituted for the words "suits of a civil nature", but this was done only to conform to Rule 2 of the Federal Rules of Civil Procedure and the change had no substantial effect on the

jurisdiction of the courts. Rosen v. Allegheny Corp., 133 F. Supp. 858, 865. Here, there is a requisite citizenship between different states among the parties and it is submitted that the aggregate value of the plaintiff's sixty-two shares of stock in the company is in excess of $10,000 and, accordingly, the amount in controversy is measured by the value of the shareholder's investment and, therefore, the jurisdictional amount is well pleaded. Lapides v. Doner, 248 F. Supp. 883, 895.

The focal point of our inquiry here is since the action laid in the complaint is one for mandamus whether, in the exercise of the court's jurisdiction, it has the power to dispose of it.

There can be no denying the assertion by the majority, as it is abundantly evident that under the All Writs Act, 28 U.S.C.A. §1651, where mandamus is sought by way of relief under a federal statute, it will not lie and that it can only be invoked in furtherance of a jurisdiction already acquired. This is established by an almost unanimous authority beginning with McIntire v. Wood, 7 Cranch 504, through Smith v. Allen, 1 Pet. 453; Graham v. Norton, 15 Wall. 427; Bath County v. Amy, 80 U.S. 244; Knapp v. Lake S. & M. S. Ry., 197 U.S. 537, to Covington and Cincinnati Bridge Co. v. Hager, 203 U.S. 108, 111, the reason stated being that the courts of the United States, in construing the All Writs Act, have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ.

Likewise, the courts have followed like reasoning in diversity cases relying on the same reasoning given in McIntire v. Wood, supra, and the other cases following it, citing County of Greene v. Daniel, 102 U.S. 187; Davenport

v. County of Dodge, 105 U.S. 237; Rosenbaum v. Bauer, 120 U.S. 450, though, here, there was a dissent which applied the conformity statute then in effect, §914, Rev. Stat., and it is suggested that the majority may have felt that since the conformative statute was a federal statute, the same restriction on the jurisdiction of the court applied as in all the other cases theretofore.

However, in spite of this great weight of authority, it is my opinion that the writ should issue. In so holding, it is unnecessary to breast the great tide of authority hereinbefore mentioned, for, in my judgment, in construing these diversity cases, the courts have never accorded Erie R.R. v. Tompkins, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of Erie R.R. v. Tompkins, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes and grant a remedy, if one is provided by state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by §308(b) of the Busi-

ness Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. Hagy v. Premier Manufacturing Corp., 404 Pa. 330. In a federal court, under Erie R.R. v. Tompkins, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure.

An indication of this approach finds basis in this court. In Susquehanna Corp. v. General Refractories Co., 250 F. Supp. 797, 802, the lower court spoke as follows: "But even if that were not so [discussing the insufficient length of time between the granting of the writ and the stockholders' meeting], it is by no means certain that the federal diversity court could not grant mandamus when that remedy would be granted by a state court as a matter of state law. The cases defendants cite, holding mandamus to be beyond the powers of the federal courts, do not specifically consider the question in the context of a state mandamus statute sought to be applied in the federal court under Erie [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]. As Loss remarks, 'on the assumption that the equitable remedial rights doctrine is dead . . . the statutory case is easy: the federal courts will use the state statute. . . .' 2 Loss 1005. But see Newark Morning Ledger Co. v. Republican Company, 188

F. Supp. 813 (D. Mass. 1960). For Erie purposes, the 'remedy' of mandamus may be a matter of substantive state law which the diversity court would be bound to apply." The lower court was affirmed by this court in a per curiam opinion at 356 F. 2d 985. It is to be noted here that in Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813, this approach under Erie R. R. v. Tompkins, supra, was not taken into consideration by the court.

Likewise, in Hertz v. Record Publishing Co., 219 F. 2d 397, where mandamus was permitted because it was in aid of a jurisdiction previously acquired, nevertheless stated in footnote 2, page 398, by way of dictum, "However, even if title to stock were in issue, the district court had jurisdiction to issue the order. Under Pennsylvania law a shareholder has the substantive right to have his stock transferred on the corporation's books and to have a new certificate issued. Mandamus is available to him by statute." Accordingly, it would seem proper that this court should now come full cycle and hold that a substantive civil right granted by a state statute which the highest court of that state, in its decisional rulings, holds might be enforced by a mandamus statute of that state, should not only recognize the substantive right granted under the statute, but, as well, the remedy provided by the state statutes, in a diversity case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed March 21, 1966, be, and the same is hereby affirmed, with costs.

Attest:

Thomas F. Quinn,
Clerk.

May 25, 1967

IN THE

Supreme Court of the United States

October Term of 1967

No.

486

J. DAVID STERN,

Petitioner

vs.

SOUTH CHESTER TUBE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

October Term Of 1967

No.

J. David Stern,

Petitioner

vs.

South Chester Tube Company,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. David Stern, petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on May 25, 1967.

CITATIONS TO OPINIONS BELOW

The Opinion of the District Court printed in the Joint Appendix filed in the Circuit Court on Page 13(a), is reported in 252 F. Sup. 329 (1966). The opinion of the Circuit Court of Appeals printed in Appendix "A" hereto, page 15, is not yet reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on May 25, 1967, Appendix page 23. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Does the United States District Court have jurisdiction to enforce the substantive right of a stockholder, established by state legislative enactment, to inspect corporate records?

STATUTES INVOLVED

The Statutory provisions involved are 28 U.S.C. 1332, Section 1.

"The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states."

and

The All Writs Act, 28 U.S.C. 1651, which provides that the lower Federal Courts

". . . . may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law".

and

The Civil Procedural Rule 81(b) which provides:

"The Writ of Scire Facias and Mandamus are abolished. Relief heretofore available by Mandamus or Scire Facias may be obtained by appropriate action or by appropriate Motion under the practice prescribed by these rules."

and

The Pennsylvania Act, which is as follows:

"Every shareholder shall have a right to examine, in person or by agent or attorney, at any reasonable time or times, for any reasonable purpose, the share register, books, or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom." 1933 May 5, P. L. 364, art. III, Sec. 308, 15 P.S. Sec. 2852-308.

STATEMENT

Petitioner, a resident of the State of New York, who owned stock of the respondent corporation valued in excess of Ten Thousand ($10,000) Dollars, filed a Complaint in the Eastern District of Pennsylvania, where the respondent was incorporated and maintained its business and offices, requesting the Court to issue an order permitting him to inspect the corporate records of the respondent. Jurisdiction of the Court was invoked under the provisions of 28 U.S.C. 1332(a). The District Court dismissed the Complaint on the ground that the relief sought was in the nature of a Writ of Mandamus which was beyond the jurisdiction of the District Court.

The Circuit Court of Appeals for the Third Circuit affirmed the opinion of the District Court with one of the three Judges who heard the case dissenting.

REASONS FOR GRANTING THE WRIT

1. The complexities of modern business require a clear statement from this Court on the rights of a stockholder as against his corporation.

2. The Circuit Court has misconstrued the decisions of this Court and has decided a question of Federal Jurisdiction, in confliet with their intent, and the intent of Congress in conferring jurisdictions in diversity cases.

3. The reasoning employed by the Circuit Court leads to results so absurd as to bring the law into disrepute.

The Commonwealth of Pennsylvania has created a substantive right and corresponding duty between private parties, viz. the right of a stockholder to inspect the corporate books. The right is enforceable at law in Pennsylvania by a writ which the State terms, a "Writ of Mandamus", and is enforceable in equity in conjunction with other relief.

15 Purdon's Statutes, Sec. 2852-308;

Strassburger vs. Philadelphia Record Company, 335 Pa. 485, 6 A. 2d 922;

Goldman vs. Trans-United Industries, 404 Pa. 288, 171 A. 2d 788;

Taylor vs. Eden Cemetery Company, 337 Pa. 203, 10 A. 2d 573;

Hagy vs. Premier Manufacturing Corp., 404 Pa. 330, 172 A. 2d 283;

Spang vs. Wertz Eng. Co., 382 Pa. 48, 114 A. 2d 143.

The Third Circuit now decides that a citizen of a foreign state may enforce this right only in the courts of Pennsylvania, and that the Federal Courts are barred although all usual requirements for Federal jurisdiction are present.

It holds that the jurisdiction of the District Courts is limited to "Civil Jurisdiction", and that an original proceeding in Mandamus is not "Civil Jurisdiction" within the meaning of 28 U.S.C. 1332(a). This doctrine is based upon a misunderstanding of the first cases decided by this Court.

The cases of *McIntyre vs. Wood*, 7 Cranch 504, *McClung vs. Silliman*, 6 Wheaton 598, and succeeding cases, decided that the Circuit Court (Now the District Court) had no power to issue a writ of mandamus commanding a state or federal official to do a ministerial act except to further the exercise of jurisdiction otherwise conferred. The Court held that the issuance of such a writ to an official was not an exercise of "Civil Jurisdiction".

In the context of the facts of these cases, the relief sought, and the reasoning of the Court, it should be obvious that the Court was thinking in terms of the descendant of the high prerogative writ, by which the King first, and later the Courts, controlled the conduct of the inferior courts and public officials.

In the case of *Kendall vs. Stokes*, 3 How. 100, the Court said:

> "The remedy in that form (mandamus), originally was not regarded as an action by the party, but as a prerogative writ, commanding the execution of an act, where otherwise justice would be obstructed; *and issuing only in cases relating to the public and government.*" (Emphasis added.)

As society and economy become more complex, an enforcement process for mandatory acts in ordinary civil cases become necessary. Thus, the Courts fashioned the old prerogative writ to this purpose. It lost its former character and became ordinary civil process.*

> "The writ of mandamus does not issue from or by any prerogative power and is nothing more than the ordinary process of a Court of Justice *to which everyone is entitled, where it is the appropriate process for asserting a claim.*" (Emphasis added.)
>
> *Kentucky vs. Dennisson,* 24 How. 66, page 98.

It was in this fashion that the Commonwealth of Pennsylvania made use of the writ to enforce the statutory right of a stockholder to inspect books. It could have referred such actions to equity which has a technique for such enforcements, or it could have fashioned another remedy. This was unnecessary. The writ of mandamus was at hand as the traditional weapon in corporate affairs, stemming from the days when corporations were created by the King's franchise, and in a

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* The Writ of Quo Warranto has undergone a similar transformation. And because it has, the District Courts have jurisdiction to issue such writ when it is civil in nature.

See *Wilder vs. Brace,* 218 F. Supp. 860, citing the *Ames* case.

special sense (by way of monopoly, etc.), extensions in the exercise of the King's power. It followed that a prerogative writ directed against public officials could be directed against corporations and their officers. It was an easy transition to continue its use, although private business corporations had long lost all governmental attributes.

What then is this "Writ of Mandamus"? It is not the old prerogative writ. It is civil process, used in ordinary civil proceedings between private parties where performance is required.

Words have a mystique. We endow them with magical attributes vesting them with the essence of the objects they denote.

This is the basic error of the Circuit Court. The word "Mandamus" was first used to describe the extraordinary prerogative writ directed against public officials. Because of this, the civil process it now describes (and since Rule 81b* the remedy of commanded performance) becomes an extraordinary remedy, outside the purview of the ordinary civil jurisdiction of the Federal Courts.

The following from the opinion of the Circuit Court of Appeals makes this obvious:

> "The plaintiff argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district

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* The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed by these rules.

court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under Sec. 1332(a) of 28 U.S.C.A. is limited to "civil actions."[1] Albanese vs. Richter, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. Insular Police Commission vs. Lopez, 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; Marshall vs. Crotty, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the 'All Writs Act', supra, and this is subject to the restrictions of the statute. It was held in Knapp vs. Lake Shore Railway Co., supra, that an earlier counterpart of the present statute did not 'confer power on the (lower) courts to issue mandamus in an original proceeding.' "

It is the position of the petitioner that, although the Pennsylvania courts enforce the right of inspection by a writ termed "mandamus", which partakes of the nature of the prerogative writ only in that it requires the performance of an act, this action is one between private parties, for the enforcement of private rights, is essentially civil in nature, and not within the doctrine of the cases decided by the Supreme Court of the United States, which deal with forms of mandamus closely akin to the

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. *Marshall vs. Crotty*, supra, 627.

old prerogative writ, public officials, or the procedures for enforcement provided by federal regulatory statutes. (e.g. *Knapp vs. Lake Shore Railway Co.,* supra.)

Under the doctrine of *Erie vs. Tompkins,* 304 U.S. 64, the Federal Courts must enforce state created substantive rights. Judge Ganey dissenting in the Court below said:

> "In my judgment, in construing these diversity cases, the courts have never accorded Erie R.R. vs. Tompkins, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of Erie R.R. vs. Tompkins, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.
>
> The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by Sec. 308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. Hagy

vs. Premier Manufacturing Corp. 404 Pa. 330. In a federal court, under Erie R.R. vs. Tompkins, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state, and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure."

The Third Circuit has disregarded the spirit and dicta of its own cases, and its opinion forces peculiar distinctions upon the courts leading to results without basis in justice or practicality.

For example: If "A" owns stock and is entitled to the certificate and everyone admits it, a District Court cannot order the delivery. It is mandamus. But if the title is in issue, the Court can determine the title and then order the delivery. It is a suit to try title. In the first instance, a citizen of a foreign state must subject himself to a local court—in the second, he may apply to the federal courts. The end result, the delivery, is the relief sought in both cases. See *Hertz vs. Record Publishing Company,* supra.

In *Susquehanna Corporation vs. General Refractories,* 250 F. Supp. 797 (cited by Judge Ganey), and in *Steinberg vs. American Bantam Car Co.,* 76 F. Supp. 426, 173 F. 2d 179, injunctions were sought and granted

enjoining meetings until corporate records were made available.

It is implicit in petitioner's request for inspection, that he seeks to determine what he must do to protect his holdings. This includes a determination of the position he should take at corporate meetings and communications of that position to other stockholders.

Must he then first seek to enjoin a meeting before he can examine records?

A result, so archaic, has no place in modern law.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
David Freeman,
Richard H. Wels,
Attorneys for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15901

J. DAVID STERN and SOPHIE L. SIEGEL,*
Appellants

v.

SOUTH CHESTER TUBE COMPANY,
Appellee

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Argued November 3, 1966
Before Ganey, Smith and Freedman, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 25, 1967)

By Smith, *Circuit Judge.*

This appeal is from the dismissal of a complaint in which the only relief sought by the appellant was the en-

* This appellant has withdrawn from the litigation.

forcement of his statutory right as a stockholder to examine the books and records of account of the corporate appellee and its subsidiaries. *Business Corporation Act*, 15 P.S. §2852-308B. The right is enforceable in an original action of mandamus in the court of common pleas of the county in which the corporation has its principal place of business. 12 P.S. §1911; *Goldman v. Trans-United Industries, Inc.*, 171 A. 2d 788 (Sup. Ct. Pa. 1961). Similar actions are not maintainable in the federal courts because of the limit on their jurisdiction.

Although the writ of mandamus has been abolished by the Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A., the procedural relief available in lieu thereof is still governed by the "All Writs Act", 28 U.S.C.A. §1651. The statute provides that the federal courts "may issue all writs necessary or appropriate In Aid of Their Respective Jurisdictions and agreeable to the usages and principles of law." (Emphasis added.)

It has been uniformly held in a long line of decisions that a federal court is without authority to issue a writ of mandamus except in aid of its jurisdiction already acquired under an applicable federal statute. *Knapp v. Lake Shore Railway Co.*, 197 U.S. 536, 541-543 (1905); *Covington Bridge Co. v. Hager*, 203 U.S. 109, 111 (1906); *Marshall v. Crotty*, 185 F. 2d 622, 626 (1st Cir. 1950). There are other cases in point but we see no reason to cite them in this opinion. The relief here sought by the plaintiff is plainly not ancillary to a suit now pending in the district court. The issuance of the writ would not be in aid of the lower court's jurisdiction; it would simply terminate the litigation.

The defendant argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under §1332(a) of 28 U.S.C.A. is limited to "civil action"[1] *Albanese v. Richter,* 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. *Insular Police Commission v. Lopez,* 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; *Marshall v. Crotty,* supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the "All Writs Act," supra, and this is subject to the restrictions of the statute. It was held in *Knapp v. Lake Shore Railway Co.,* supra, that an earlier counterpart of the present statute did not "confer power on the [lower] courts to issue mandamus in an original proceeding."

We recognize that a federal court may enforce a state-created substantive right, and to do so fashion an appropriate remedy. *Cf. Guaranty Trust Co. v. York,* 326 U.S. 99, 105-107 (1945). However, we are not here concerned with the question of remedy but one of jurisdiction. The general jurisdiction of the district courts is limited and defined strictly by statute, in this case by §1651(a) of Title 28 U.S.C.A., supra. *United States v.*

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. *Marshall v. Crotty,* supra, 627.

First Federal Savings & Loan Ass'n., 248 F. 2d 804 (7th Cir. 1957), cert. den. 355 U.S. 957. When thus limited and defined it cannot be extended by local statute. "The basic purpose of §1651, and of its statutory predecessors, was to assure to the various federal courts the power to issue appropriate writs . . . of an auxillary nature in Aid of Their Respective Jurisdictions as Conferred by other provisions of the law." (Emphasis added). *In Re Previn*, 204 F. 2d 417, 418 (1st Cir. 1953). It seems to me that the issuance of a writ of mandamus in this case would violate the plain statutory limitation on the lower court's jurisdiction.

The judgment of the district court will be affirmed.

Judge Freedman concurs in this opinion.

Ganey, *Circuit Judge*, dissenting.

In this country federal jurisdiction was originally vested in the courts of the United States under the Judiciary Act of 1789. By the Eleventh Section thereof the courts of the United States were vested with original jurisdiction of "all suits of a civil nature at common law or in equity" where the amount in dispute exceeded the sum of $500 and the parties were citizens of different states. Present jurisdiction is vested under 28 U.S.C.A. §1332(a)(1) in which, under the 1948 revision of this section, the words "civil action" were substituted for the words "suits of a civil nature", but this was done only to conform to Rule 2 of the Federal Rules of Civil Procedure and the change had no substantial effect on the jurisdiction of the courts. *Rosen v. Allegheny Corp.*, 133 F. Supp. 858, 865. Here, there is a requisite citizen-

ship between different states among the parties and it is submitted that the aggregate value of the plaintiff's sixty-two shares of stock in the company is in excess of $10,000 and, accordingly, the amount in controversy is measured by the value of the shareholder's investment and, therefore, the jurisdictional amount is well pleaded. *Lapides v. Doner,* 248 F. Supp. 883, 895.

The focal point of our inquiry here is since the action laid in the complaint is one for mandamus whether, in the exercise of the court's jurisdiction, it has the power to dispose of it.

There can be no denying the assertion by the majority, as it is abundantly evident that under the All Writs Act, 28 U.S.C.A. §1651, where mandamus is sought by way of relief under a federal statute, it will not lie and that it can only be invoked in furtherance of a jurisdiction already acquired. This is established by an almost unanimous authority beginning with *McIntire v. Wood,* 7 Cranch 504, through *Smith v. Allen,* 1 Pet. 453; *Graham v. Norton,* 15 Wall. 427; *Bath County v. Amy,* 80 U.S. 244; *Knapp v. Lake S. & M. S. Ry.,* 197 U.S. 537, to *Covington and Cincinnati Bridge Co. v. Hager,* 203 U.S. 108, 111, the reason stated being that the courts of the United States, in construing the All Writs Act, have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ.

Likewise, the courts have followed like reasoning in diversity cases relying on the same reasoning given in *McIntire v. Wood,* supra, and the other cases following it, citing *County of Greene v. Daniel,* 102 U.S. 187; *Davenport v. County of Dodge,* 105 U.S. 237; *Rosenbaum v. Bauer,* 120 U.S. 450, though, here, there was a dissent which ap-

plied the conformity statute then in effect, §914, Rev. Stat., and it is suggested that the majority may have felt that since the conformative statute was a federal statute, the same restriction on the jurisdiction of the court applied as in all the other cases theretofore.

However, in spite of this great weight of authority, it is my opinion that the writ should issue. In so holding, it is unnecessary to breast the great tide of authority hereinbefore mentioned, for, in my judgment, in construing these diversity cases, the courts have never accorded *Erie R. R. v. Tompkins*, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of *Erie R. R. v. Tompkins*, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes and grant a remedy, if one is provided by state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by §308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of

mandamus. *Hagy v. Premier Manufacturing Corp.*, 404 Pa. 330. In a federal court, under *Erie R. R. v. Tompkins*, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure.

An indication of this approach finds basis in this court. In *Susquehanna Corp. v. General Refractories Co.*, 250 F. Supp. 797, 802, the lower court spoke as follows: "But even if that were not so [discussing the insufficient length of time between the granting of the writ and the stockholders' meeting], it is by no means certain that the federal diversity court could not grant mandamus when that remedy would be granted by a state court as a matter of state law. The cases defendants cite, holding mandamus to be beyond the powers of the federal courts, do not specifically consider the question in the context of a state mandamus statute sought to be applied in the federal court under *Erie* [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]. As Loss remarks, 'on the assumption that the equitable remedial rights doctrine is dead . . . the statutory case is easy: the federal courts will use the state statute . . . .' 2 Loss 1005. But see *Newark Morning Ledger Co. v. Republican Company*, 188 F. Supp. 813 (D. Mass. 1960). For *Erie* purposes, the 'remedy' of mandamus may be a matter of substantive state law which the diversity court would be bound to

apply." The lower court was affirmed by this court in a per curiam opinion at 356 F. 2d 985. It is to be noted here that in *Newark Morning Ledger Co. v. Republican Co.*, 188 F. Supp. 813, this approach under *Erie R. R. v. Tompkins*, supra, was not taken into consideration by the court.

Likewise, in *Hertz v. Record Publishing Co.*, 219 F. 2d 397, where mandamus was permitted because it was in aid of a jurisdiction previously acquired, nevertheless stated in footnote 2, page 398, by way of dictum, "However, even if title to stock were in issue, the district court had jurisdiction to issue the order. Under Pennsylvania law a shareholder has the substantive right to have his stock transferred on the corporation's books and to have a new certificate issued. Mandamus is available to him by statute." Accordingly, it would seem proper that this court should now come full cycle and hold that a substantive civil right granted by a state statute which the highest court of that state, in its decisional rulings, holds might be enforced by a mandamus statute of that state, should not only recognize the substantive right granted under the statute, but, as well, the remedy provided by the state statutes, in a diversity case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed March 21, 1966, be, and the same is hereby affirmed, with costs.

Attest:

Thomas F. Quinn,
Clerk.

May 25, 1967

IN THE

Supreme Court of the United States

No. 486 OCTOBER TERM, 1967

J. DAVID STERN,

Petitioner,

v.

SOUTH CHESTER TUBE COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 486 October Term, 1967

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, 252 F. Supp. 329, is printed at page 13a of the Joint Appendix filed in the court of appeals. The opinion of the court of appeals, 378 F.2d 205, is printed in the Appendix to the Petition at page 15.

JURISDICTION

The judgment of the court of appeals affirming the dismissal of petitioner's complaint by the district court

was entered on May 25, 1967. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should certiorari be granted to reexamine the rule, established and consistently followed by this Court, that the United States District Courts lack jurisdiction to grant relief in the nature of mandamus against a private defendant if such an order is the only relief which the plaintiff seeks, when (1) there is no conflict of decisions concerning the rule, (2) Congress as recently as 1962 recognized the existence of the rule but enacted an amendatory statute limited to relief against federal officials and agencies, and (3) the instant case is one of a type which rarely occurs in the federal system and in which the plaintiff has available an adequate state remedy to attempt to establish his state-created right.

STATUTES INVOLVED

The case involves the interpretation of the All Writs Act, now codified as 28 U.S.C. § 1651(a) (1964):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act as originally enacted, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), provided that

> "all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas*

corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law".

Relevant to the interpretation of the All Writs Act is the section added to the Judicial Code by Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964):

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Federal Rules of Civil Procedure, the effect of which is not disputed in the instant case, provide in Rule 81(b):

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming an order of the district court dismissing his civil action in which jurisdiction was grounded on diversity of citizenship. Petitioner's sole request for relief was for an order to compel inspection of the records of the respondent, a private corporation organized under Pennsylvania law with its principal place of business in Pennsylvania and in which plaintiff, a citizen of New York, owns 62 of the 20,000 outstanding shares. Prior to dismissal of the complaint, a second shareholder, who was a citizen of Pennsylvania and represented by the same

counsel as petitioner, was allowed to intervene as a party plaintiff.

Respondent corporation filed an answer on the merits to petitioner's complaint and pleaded in addition that the district court lacked jurisdiction of the subject matter. The district court granted respondent's motion to dismiss on the ground that the court lacked jurisdiction to issue an order in the nature of a writ of mandamus when such an order is the only relief sought by the plaintiff. A decision was therefore unnecessary with respect to respondent's second jurisdictional issue concerning the absence of the jurisdictional amount.

During oral argument of petitioner's appeal it was suggested from the bench that diversity of citizenship was destroyed by the presence of the intervening plaintiff, a citizen of Pennsylvania; subsequently the court granted that plaintiff's motion, consented to by respondent, to withdraw from the litigation. The court then affirmed the dismissal by the district court, with one judge dissenting.

ARGUMENT

I. The decisions at all levels of the federal judicial system uniformly support the rule that a district court lacks jurisdiction to issue an order in the nature of mandamus in a diversity case to compel inspection of the records of a private corporation when that order is the only relief which the plaintiff seeks.

Petitioner cites no decisions at any level in conflict with the decision of the court of appeals because no such decisions exist.

Petitioner himself concedes the initial question as to the nature of the relief which he sought in the district court. Both opinions of the court of appeals (378 F.2d at 206, 207-08; Appendix to Petition, pp. 16, 18, 22), the opinion

of the district court, 252 F. Supp. at 331, and the petitioner (Petition, pp. 7-8) agree that the relief sought in the instant case is relief in the nature of an original writ of mandamus, regardless of whether the test of the nature of the remedy should be found in the general common law, *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 865 (S.D.N.Y. 1955), or the law of the state having jurisdiction over the corporation. *Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960). As the district court correctly held, 252 F. Supp. at 331:

> "the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus."

The decisions have uniformly recognized that the United States District Courts lack jurisdiction of cases in which mandamus is the only relief sought by the plaintiff, absent a specific federal statute conferring such jurisdiction. This jurisdictional limitation arises from the language of the All Writs Act, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), which provided that:

> "all the before-mentioned courts . . . shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the principles and usages of law".* (Emphasis added.)

This Court held that an original action for mandamus does not create such necessity, since the writ would be necessary

> "Not because that Court possesses jurisdiction, but

* As now codified, 28 U.S.C. § 1651(a) (1964), the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> because it does not possess it . . . The 14th section of the act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued out." *McClung* v. *Silliman*, 6 Wheat. 598, 601-02.

Since that time, the law has been "well established that a United States district court, outside of the District of Columbia, does not have jurisdiction to issue the writ of mandamus." *United States ex rel. Barmore* v. *Miles*, 177 F. Supp. 172, 173 (W. D. Mich. 1959). The courts of the District of Columbia, having all the common law powers of courts of general jurisdiction of the State of Maryland as of 1801, are unique in having the power to issue an original mandamus. *Kendall* v. *United States*, 12 Pet. 524, 622-25.

This Court has adhered to the rule through successive changes in the wording of the original Judiciary Act. In *Knapp* v. *Lake S. & M. S. Ry.*, 197 U.S. 536, the Court rejected an argument that a change in the doctrine was required either by changes in the language of the jurisdictional statutes or "in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby." 197 U.S. at 541. Since both the adoption in 1937 of Fed. R. Civ. P. 81(b) and the 1948 revision of the Judicial Code, "the courts have adhered to the view that Congress has not vested in the district courts original jurisdiction in cases of mandamus, without any suggestion that the revised jurisdictional phraseology wrought any change." *Marshall* v. *Crotty*, 185 F.2d 622, 627 (1st Cir. 1950).

Furthermore, the courts have consistently held that a district court could not "make a writ of injunction serve the purpose of a writ of mandamus. . . . What the court

was without the power to do directly, it was without the power to do indirectly." *Fineran* v. *Bailey*, 2 F.2d 363 (5th Cir. 1924).

The absence of jurisdiction in a United States District Court to issue an order to compel inspection of corporate records has been recognized in all diversity actions involving facts similar to those of the instant case. *E.g., Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960); *Selman* v. *Colborn*, 143 F. Supp. 112, 113 (S.D.N.Y. 1956); *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 864-65 (S.D.N.Y. 1955); *Breswick & Co.* v. *Briggs*, 136 F. Supp. 301, 303-04 (S.D.N.Y. 1955).

In each of those cases, the plaintiff sought an order to compel inspection of corporate records of the defendant. In each case, the court determined that the order requested was in the nature of a writ of mandamus. In each case the court then denied relief on the ground that a United States District Court lacked jurisdiction to issue an order. *Accord, Wilder* v. *Brace*, 218 F. Supp. 860, 863 (D. Me. 1963) (dictum); *Greenough* v. *Independence Lead Mines Co.*, 45 F.2d 659, 660 (N.D. Idaho 1930) (alternative holding).

Both petitioner and the dissenting judge below appear to agree that no conflict of decisions exists. The dissenting judge suggests, however, that another decision of the same district court, *Susquehanna Corp.* v. *General Refractories Co.*, 250 F. Supp. 797 (E.D. Pa. 1966), might indicate a different result. But even if the dicta in that decision are read broadly, no conflict exists. The District Judge deciding the instant case carefully considered and distinguished the *Susquehanna Corp.* decision, which had been reviewed and modified by the court of appeals less than a month before his decision entered in the instant case. See 252 F. Supp. at 332. The appeal from the district court in the *Susquehanna Corp.* case was heard by a panel which included Circuit Judge Freedman, who concurred in the *per curiam*

affirmance of the "basic position" of the district court, with certain modifications as to the relief to be granted. 356 F.2d 985 (3d Cir. 1966). Judge Freedman also heard the instant case and also concurred in the opinion of the court.

There is, therefore, no conflict of decisions which would justify certiorari in the instant case.

II. Congress has repeatedly recognized and confirmed this Court's limitation on district court jurisdiction in mandamus, most recently in 1962 when both Houses explicitly referred to the rule but created new jurisdiction only with respect to relief against federal officials.

Congress has long recognized and acquiesced in the consistent judicial interpretation of the All Writs Act to exclude district court jurisdiction of original actions in the nature of mandamus. When Congress has desired that original mandamus be available to litigants, the grant of jurisdiction to the district courts has been narrowly framed to deal with specific rights and specific classes of cases.

For example, no general mandamus jurisdiction has been created with respect to rights and obligations under the Interstate Commerce Act. Instead, Congress has at various times provided that the "district courts of the United States shall have jurisdiction . . . to issue a writ or writs of mandamus" to enforce various parts of the Act. Compare the following sections of the Interstate Commerce Act: (1) 25 Stat. 855, 862 (1889), as amended, 56 Stat. 301 (1942), 49 U.S.C. § 23 (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to command carriers to provide equal facilities to shippers; (2) 34 Stat. 584, 594-95 (1906), as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), creating district court "jurisdiction . . . to issue a writ or writs of manda-

mus" to enforce "this chapter" of the Act*; and (3) 37 Stat. 701, 703 (1913), as amended, 41 Stat. 493 (1920), 49 U.S.C. § 19a(*l*) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" commanding compliance "with the provisions of this section."

Congress has also reenacted Section 14 of the original Judiciary Act, with various changes in phraseology and some changes in substance, but without attempting to change this Court's interpretation of the limitations on original jurisdiction in mandamus. Compare the original section, 1 Stat. 81-82 (*supra* at p. 2); with Rev. Stat. § 716 (1875); and 36 Stat. 1162 (1911); and the present 28 U.S.C. § 1651(a); see Reviser's Note to 28 U.S.C. § 1651 (1964). These reenactments bring the All Writs Act squarely within the class of statutes which Congress has amended without amending a particular section, thus requiring the courts to "assume that it has been satisfied with, *and adopted*, the construction given to its enactment by the courts." *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14. (Emphasis added.)

Furthermore, Congress as recently as 1962 has specifically considered the rule laid down in the prior decisions and has determined to amend the Judiciary Act only with respect to jurisdiction in mandamus against federal officers and agencies. Congress and the Judicial Conference of the United States recognized that the limitation of mandamus jurisdiction to the district courts of the District of Columbia acted as an inconvenience to private litigants seeking relief against actions of the federal Government. By Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964), Congress provided that:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an

* The words "said Act" in 34 Stat. 594-95 were changed to "this part" by 49 Stat. 543; the editors of the United States Code have "translated" the words "this part" to read "this chapter." See Historical Note to 49 U.S.C.A. § 20, par. (9) (1951).

officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Under this section, orders in the nature of mandamus may be granted against officers of the United States by any district court.

Prior to the enactment of this amendment, both Houses recognized the limitations upon the mandamus jurisdiction. The report of the House Judiciary Committee, H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961), to accompany H.R. 1960, which became Public Law 87-748, stated at page 2:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus. Nor has the abolition of mandamus by rule 81(b) of the Federal Rules of Civil Procedure altered this jurisdictional limitation, since the Federal rules did not change either the substance of the relief which the district courts could grant or the cases over which they had jurisdiction.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia."

Similar language appears in Senate Report No. 1992, 87th Cong., 2d Sess. 2 (1962), reprinted 1962 U.S.C. Cong. & Admin. News 2784, 2785.

The long and consistent legislative history of specific enactments to create district court jurisdiction in mandamus establishes that the rule declared by this Court has been confirmed by Congress. Under these circumstances, that jurisdiction should not be expanded except by statute, enacted after appropriate consultation and deliberation by both the Judicial Conference, pursuant to the mandate

of 28 U.S.C. § 331 (1964), and the responsible Congressional committees.

III. The limitation has no significant impact on most diversity litigation involving corporations and those few cases in which relief may be obtained only in the state courts are the cases most appropriately disposed of by those courts.

Petitioner makes no argument that review should be granted because the rule adopted by this Court and followed by the court of appeals has any significant impact on cases other than this one.

In any event, the instant case is one of those very few involving shareholders' rights in which the limitation on mandamus jurisdiction has any effect.

In those cases in which the complexity of the litigation might perhaps be said to justify federal jurisdiction, typically cases involving mergers of corporations operating in different states, federal causes of action are generally asserted under the federal securities acts or the federal anti-trust laws; orders in the nature of mandamus, even if necessary to supplement discovery under the Federal Rules of Civil Procedure, are in such cases ancillary to the exercise of jurisdiction otherwise acquired. Even if the plaintiffs in such a case rely only on state-created causes of action, orders in the nature of mandamus will frequently be proper as ancillary to the district court's general powers of equitable intervention, as in *Susquehanna Corp.* v. *General Refractories Co.*, 250 F. Supp. 297 (E.D. Pa.), *modified*, 356 F.2d 985 (3d Cir. 1966).

The only cases involving shareholders' rights in which the absence of jurisdiction is likely to have an effect are those in which the plaintiff seeks nothing but the bare enforcement of a state-created right, such as the inspection of corporate records sought in the instant case.

Such cases are exactly the cases which, in a rational allocation of judicial business between the federal and state courts, would most reasonably be left to the state courts. This is particularly the case when, as here, the parties are in dispute both as to issues of law involving the scope of the inspection allowed by the state corporation statutes and issues of fact, including the good faith of the petitioner in seeking inspection.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RALPH EARLE II,
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IN THE

Supreme Court of the United States

October Term of 1967

No. 486

J. DAVID STERN,
Appellant

vs.

SOUTH CHESTER TUBE COMPANY,
Respondent

BRIEF FOR APPELLANT

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CITATIONS TO OPINIONS BELOW

The Opinion of the District Court (A. 11a) is reported in 252 F. Supp. 329 (1966). The opinion of the Circuit Court of Appeals (A. 19a) is reported in 378 F. 2d 205 (1967).

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 25, 1967 (A. 27a). Petition for certiorari to this court was docketed on August 14, 1967 and was granted on October 23, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

III.

STATUTES INVOLVED

The Statutory provisions involved are 28 U.S.C. 1332, Section 1.

> "The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states."

The All Writs Act, 28 U.S.C. 1651, which provides that the lower Federal Courts

> ". . . may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law".

Section 34 of the Federal Judiciary Act, 28 U.S.C.A. Section 725:

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Pennsylvania Act, 15 Purdon's Statutes, Sec. 2852-308:

> "Every shareholder shall have a right to examine, in person or by agent or attorney, at any

reasonable time or times, for any reasonable purpose, the share register, books, or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom."

IV.

QUESTION PRESENTED

Does the United States District Court have jurisdiction to enforce the substantive right of a stockholder, established by state legislative enactment, to inspect corporate records?

V.

STATEMENT OF THE CASE

Petitioner, a resident of the State of New York, who owned stock of the respondent corporation valued in excess of Ten Thousand ($10,000) Dollars, filed a Complaint (A. 3a) in the Eastern District of Pennsylvania, where the respondent was incorporated and maintained its business and offices, requesting the Court to issue an order permitting him to inspect the corporate records of the respondent. Jurisdiction of the Court was invoked under the provisions of 28 U.S.C. 1332(a). The District Court dismissed the Complaint on the ground that the relief sought was in the nature of a Writ of Mandamus which was beyond the jurisdiction of the District Court (A. 11a).

The Circuit Court of Appeals for the Third Circuit affirmed the opinion of the District Court with one of the three Judges who heard the case dissenting (A. 19a).

VI.
SUMMARY OF ARGUMENT

Pennsylvania provides that a stockholder may examine corporate records.

This suit, to force their exhibition, is between private parties for the protection of private rights and is therefore a civil action within the meaning of 28 U.S.C. 1332, Section 1, conferring jurisdiction on the District Courts in "civil actions".

It is not controlled by cases where the relief sought (mandamus) was the performance of an official duty by a public officer or the enforcement of an order of a regulatory commission. These were not considered civil actions, but requests for extraordinary relief, not within the civil jurisdiction of the District Courts.

The writer cannot find any case in which the Supreme Court held that the District Courts do not have powers to issue mandatory orders in private litigation.

The doctrine of *Erie vs. Tompkins,* 304 U.S. 64, requires the application of state law. If the action is within the jurisdiction of the State court, the Federal Courts have the same jurisdiction as to right and remedy unless there be some *positive* interdiction by Congress. There is no such positive denial by Congress in the instant case.

Procedural manipulation and incongruous results are vices to be avoided by the law. A decision, based on archaic technicalities without purpose, leads to anomalies set forth in the main argument.

VII.

ARGUMENT

1. THIS IS A CIVIL ACTION WITHIN THE MEANING OF JURISDICTIONAL STATUTE (28 U.S.C. 1332—SECTION 1)

The Commonwealth of Pennsylvania has created a substantive right and corresponding duty between private parties, viz., the right of a stockholder to inspect the corporate books. The right is enforceable at law in Pennsylvania by a writ which the State terms, a "Writ of Mandamus", and is enforceable in equity in conjunction with other relief.

15 Purdon's Statutes, Sec. 2852-308;

Strassburger vs. Philadelphia Record Company, 335 Pa. 485, 6 A. 2d 922;

Goldman vs. Trans-United Industries, 404 Pa. 288, 171 A. 2d 788;

Taylor vs. Eden Cemetery Company, 337 Pa. 203, 10 A. 2d 573;

Hagy vs. Premier Manufacturing Corp., 404 Pa. 330, 172 A. 2d 283;

Spang vs. Wertz Eng. Co., 382 Pa. 48, 114 A. 2d 143.

The Third Circuit now decides that a citizen of a foreign state may enforce this right only in the courts

of Pennsylvania, and that the Federal Courts are barred although all usual requirements for Federal jurisdiction are present.

It holds that the jurisdiction of the District Courts is limited to "Civil Jurisdiction", and that an original proceeding in Mandamus is not "Civil Jurisdiction" within the meaning of 28 U.S.C. 1332(a). This doctrine is based upon a misunderstanding of the first cases decided by this Court.

The cases of *McIntyre vs. Wood,* 7 Cranch 504, *M'Cluny vs. Silliman,* 6 Wheaton 598, and succeeding cases, decided that the Circuit Court (Now the District Court) had no power to issue a writ of mandamus commanding a state or federal official to do a ministerial act except to further the exercise of jurisdiction otherwise conferred. The Court held that the issuance of such a writ to an official was not an exercise of "Civil Jurisdiction".

In the context of the facts of these cases, the relief sought, and the reasoning of the Court, it should be obvious that the Court was thinking in terms of the descendant of the high prerogative writ, by which the King first, and later the Courts, controlled the conduct of the inferior courts and public officials.

> "It is a writ, in England, issuing out of the King's Bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is suppose to be consonant to right and justice, and where there is no other adequate specific remedy."

Kendall vs. United States, 12 Peters 524, at p. 614.

As society and economy become more complex, an enforcement process for mandatory acts in ordinary civil cases become necessary. Thus, the Courts fashioned the old prerogative writ to this purpose. It lost its former character and became ordinary civil process.*

It was in this fashion that the Comonwealth of Pennsylvania made use of the writ to enforce the statutory right of a stockholder to inspect books. It could have referred such actions to equity which has a technique for such enforcements, or it could have fashioned another remedy. This was unnecessary. The writ of mandamus was at hand as the traditional weapon in corporate affairs, stemming from the days when corporations were created by the King's franchise, and in a special sense (by way of monopoly, etc.), extensions in the exercise of the King's power. It followed that a prerogative writ directed against public officials could be directed against corporations and their officers. It was an easy transition to continue its use, although private business corporations had long lost all governmental attributes.

What then is this "Writ of Mandamus"? It is not the old prerogative writ. It is civil process, used in ordinary civil proceedings between private parties where performance is required.

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* The Writ of Quo Warranto has undergone a similar transformation. And because it has, the District Courts have jurisdiction to issue such writ when it is civil in nature.

See *Wilder vs. Brace,* 218 F. Supp. 860, citing the *Ames* case.

Words have a mystique. We endow them with magical attributes vesting them with the essence of the objects they denote.

This is the basis of the Circuit Court's opinion. The word "Mandamus" was first used to describe the extraordinary prerogative writ directed against public officials. Because of this, the civil process it now describes (and since Rule 81b* the remedy of commanded performance) becomes an extraordinary remedy, outside the purview of the ordinary civil jurisdiction of the Federal Courts.

The following from the opinion of the Circuit Court of Appeals makes this obvious:

> "The plaintiff argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under Sec. 1332(a) of 28 U.S.C.A. is limited to 'civil actions.'[1] Albanese vs. Richter, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a 'civil action' within the meaning of the said statute. Insular Police Commission vs. Lopez, 160

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* The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed by these rules.

[1] "The phrase 'civil actions' has been substituted for the earlier language 'suits of a civil nature, at common law or at equity.' The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus." *Marshall vs. Crotty*, supra, 627.

F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; Marshall vs. Crotty, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. . . ."

It is the position of the appellant that, although the Pennsylvania courts enforce the right of inspection by a writ termed "mandamus", which partakes of the nature of the prerogative writ only in that it requires the performance of an act, this action is one between private parties, for the enforcement of private rights, is essentially civil in nature, and not within the doctrine of the cases decided by the Supreme Court of the United States, which deal with forms of mandamus closely akin to the prerogative writ, viz., requiring public officials to perform their duties, or to levy taxes for the payment of bonds, or to pay debts out of public funds. There was dissent in the latter case, on the theory that though the action, in form, was against a public official, in essence it was merely process for the collection of a debt and therefore civil in nature (See opinion and dissent, *Rosenbaum vs. Bauer,* 120 U.S. 450).

In *Knapp vs. Lake Shore Railway Co.* (197 U.S. 536), the Court refused to issue mandamus against the railway to enforce an order of the Interstate Commerce Commission. This would not constitute "civil jurisdiction" or a "civil action" within the ordinary meaning of those terms.

There appears to be no case in which this Court has held that the District Courts do not have power to issue mandatory orders in private litigation. To so hold now, because the term "mandamus" has been extended to include actions, private in nature, as well as actions against

public officials, is to make obeisance to a word, at the expense of content and reason. It would undermine the intent of Congress, the purpose of diversity jurisdiction and ignore the requirements of modern business.

2. THE ERIE DOCTRINE CONFERS JURISDICTION BY VIRTUE OF THE APPLICATION OF SECTION 34 OF THE FEDERAL JUDICIARY ACT (28 U.S.C.A. 725)

Erie Railway Co. vs. Tompkins, 304 U.S. 64, held that (p. 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied is the law of the State."

It would follow, that unless there is some direct prohibition by Congress, that the District Courts should be able to enforce the law which they are required to apply.

Judge Ganey dissenting in the court below said:

> "In my judgment, in construing these diversity cases, the courts have never accorded Erie R.R. vs. Tompkins, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of Erie R.R. vs. Tompkins, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state

statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by Sec. 308(b) of the Business Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. Hagy vs. Premier Manufacturing corp., 404 Pa. 330. In a federal court, under Erie R.R. vs. Tompkins, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state, and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure."

3. THE OPINION OF THE CIRCUIT COURT LEADS TO THE VICE OF PROCEDURAL MANIPULATION

The Third Circuit has disregarded the spirit and dicta of its own cases, and its opinion forces peculiar distinctions upon the courts leading to results without basis in justice or practicality.

For example: If "A" owns stock and is entitled to the certificate and everyone admits it, a District Court cannot order the delivery. It is mandamus. But if the title is in issue, the Court can determine the title and then order the delivery. It is a suit to try title. In the first instance, a citizen of a foreign state must subject himself to a local court—in the second, he may apply to the federal courts. The end result, the delivery, is the relief sought in both cases. See *Hertz vs. Record Publishing Company*, supra.

In *Susquehanna Corporation vs. General Refractories*, 250 F. Supp. 797 (cited by Judge Ganey), and in *Steinberg vs. American Bantam Car Co.*, 76 F. Supp. 426, 173 F. 2d 179, injunctions were sought and granted enjoining meetings until corporate records were made available.

It is implicit in petitioner's request for inspection, that he seeks to determine what he must do to protect his holdings. This includes a determination of the position he should take at corporate meetings and communications of that position to other stockholders.

Must he then first seek to enjoin a meeting before he can examine records?

A result, so archaic, has no place in modern law.

VIII.

CONCLUSION

Appellant therefore requests that this case be remanded to the court below with instructions that it be heard and considered on its merits.

Respectfully submitted,
DAVID FREEMAN,
Attorney for Appellant.

IN THE

Supreme Court of the United States

No. 486 OCTOBER TERM, 1967

J. DAVID STERN,
Petitioner

v.

SOUTH CHESTER TUBE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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v.

South Chester Tube Company,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, 252 F. Supp. 329, is printed in the Appendix at page 11a. The opinions of the court of appeals, 378 F.2d 205, are printed in the Appendix at page 19a.

JURISDICTION

The judgment of the court of appeals affirming the dismissal by the district court of petitioner's complaint was entered on May 25, 1967. The petition for certiorari was filed on August 14, 1967 and granted on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves the construction of the All Writs Act, now codified as 28 U.S.C. § 1651(a) (1964):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act as originally enacted, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), provided:

> "That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Relevant to the interpretation of the All Writs Act is the section added to the Judicial Code by Public

Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964):

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Federal Rules of Civil Procedure provide in Rule 81(b):

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

QUESTION PRESENTED

Should this Court now overrule a uniform line of decisions extending from 1821 and repeatedly left unchanged by Congress, most recently in 1962, which required the courts below in the instant case to hold that a limitation in the language of the All Writs Act deprives the federal district courts of jurisdiction to grant relief in the nature of mandamus against a private defendant when such an order is the only relief which the plaintiff seeks?

STATEMENT

Petitioner, the plaintiff below, seeks reversal of the judgment of the court of appeals affirming an

order of the district court dismissing his civil action in which jurisdiction was grounded on diversity of citizenship (A. 3a). Petitioner's sole request for relief was for an order to compel inspection of the records of the respondent, a private corporation organized under Pennsylvania law with its principal place of business in Pennsylvania and in which plaintiff, a citizen of New York, owns 62 of the 20,000 outstanding shares.*

Respondent corporation filed an answer on the merits to petitioner's complaint, pleading, among other defenses, that petitioner's demand for inspection was not made in good faith and that the district court lacked jurisdiction of the subject matter (A. 6a).

The district court granted respondent's motion to dismiss (A. 10a) on the ground that the court lacked jurisdiction to issue an order in the nature of a writ of mandamus when such an order is the only relief sought by the plaintiff (A. 11a). No decision was rendered with respect to respondent's second jurisdictional defense concerning the absence of the jurisdictional amount (A. 4a).

The court of appeals affirmed the dismissal by the district court, with one judge dissenting (A. 19a, 22a).

* A second shareholder, who was a citizen of Pennsylvania, was allowed to intervene prior to dismissal of the complaint; subsequently the court of appeals granted the motion of that plaintiff, consented to by respondent, to withdraw from the litigation in order to retain diversity jurisdiction.

SUMMARY OF ARGUMENT

I. The only relief sought by the petitioner in the district court was an order to compel inspection of the corporate records of the defendant, a Pennsylvania corporation. Under both the general common law and the law of Pennsylvania, such relief constitutes an order in the nature of a writ of mandamus.

The All Writs Act, Section 14 of the Judiciary Act of 1789, created jurisdiction in the district courts to issue writs of mandamus when "necessary for the exercise of their respective jurisdictions," but not when the writ itself was the only relief sought. *M'Clung* v. *Silliman,* 6 Wheat. 598. The limitation reflects the Congressional intention in 1789 to place narrow limits upon the jurisdiction of the lower federal courts, particularly the jurisdiction to issue writs. The gradual expansion by statute of the general diversity and federal question jurisdiction has not removed the limitation on mandamus because the original limiting language of the All Writs Act remains unchanged.

II. Congress has repeatedly recognized the limitation on mandamus and has enacted statutes to create district court jurisdiction to issue writs of mandamus in narrowly defined classes of cases, but has never created a general jurisdiction in mandamus by amending the relevant language of the All Writs Act. The Interstate Commerce Act, for example, contains several sections, each enacted at a different time, to create

mandamus jurisdiction to enforce specific portions of the Act, but Congress has not created mandamus jurisdiction to enforce the Act generally.

In 1962, Congress for the first time created a general jurisdiction in original mandamus in the district courts, but limited the jurisdiction to cases involving relief against federal officers and agencies. The legislative history of the 1962 statute establishes that the absence of district court jurisdiction in mandamus was brought to the attention of both houses in three identical committee reports, one of which was reprinted in the Congressional Record.

III. The change in the interpretation of the Rules of Decision Act announced in *Erie R.R.* v. *Tomkins,* 304 U.S. 64, does not create jurisdiction in the district courts to issue all writs within the jurisdiction of state courts, because the federal limitation arises from the All Writs Act and from the plenary power of Congress to limit the jurisdiction of district courts. That power was not affected by the *Erie* decision, *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 105-06, as indeed it should not have been, since the limitation on mandamus jurisdiction creates none of the evils which the *Erie* decision sought to reverse, including especially the evil of producing a result on the merits in the federal court which might be different from the result on the merits obtainable in a state court.

ARGUMENT.

I. The federal decisions uniformly and correctly hold that the All Writs Act does not allow a district court to issue an order in the nature of mandamus in a diversity case against a private defendant when that order is the only relief which the plaintiff seeks.

Petitioner cites no decisions at any level which are in conflict with the decision of the court of appeals because no such decisions exist.

Petitioner himself concedes the initial question as to the nature of the relief which he sought in the district court. Both opinions of the court of appeals, 378 F.2d at 206, 207-08 (Appendix 20a, 23a, 24a-25a), the opinion of the district court, 252 F. Supp. at 331 (Appendix 14a), and the petitioner (Brief 8; Petition 7-8) agree that the relief sought in the instant case is relief in the nature of an original writ of mandamus, regardless of whether the test of the nature of the remedy should be found in the general common law, *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 865 (S.D.N.Y. 1955), or the law of the state having jurisdiction over the corporation. *Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960). As the district court correctly held, 252 F. Supp. at 331:

> "the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus."

The decisions have uniformly recognized that the United States District Courts lack jurisdiction of cases in which mandamus is the only relief sought by the plaintiff, absent a specific federal statute conferring such jurisdiction. This jurisdictional limitation arises from the language of the All Writs Act, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), which provided:

> "That all the before-mentioned courts . . . shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. —*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."* (Emphasis added.)

This Court held that an original action for mandamus does not create such necessity, since the writ would be necessary

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* As now codified, 28 U.S.C. § 1651(a) (1964), the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

"Not because that Court possesses jurisdiction, but because it does not possess it. . . .

"The 14th section of the [Judiciary] act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued out." *M'Clung* v. *Silliman,* 6 Wheat. 598, 601-02.

The validity of the decision in *M'Clung* v. *Silliman* is demonstrated by an analysis of the language of the original Judiciary Act. If the words "which may be necessary for the exercise of their respective jurisdictions" did not constitute a limitation on the jurisdiction to issue writs created in the first sentence of the section, including specifically the writ of habeas corpus, there would seem to be no need for the second sentence creating a specific power to grant writs of habeas corpus in a limited class of cases.

The statutory basis of the *M'Clung* decision appears even more clearly when the language of the adjoining Section 13 of the Judiciary Act, 1 Stat. 81, is contrasted with the language of Section 14. Section 13 is the original provision with respect to the jurisdiction of the Supreme Court which was considered in *Marbury* v. *Madison,* 1 Cranch 137. The original Section 13 provided:

"The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after

> specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*" (Emphasis added.)

The words "which may be necessary for the exercise of their respective jurisdictions" do not appear in Section 13, although both sections use the phrase "principles and usages of law." Read together, these sections show an intent by the Congress to allow the Supreme Court to issue the original writ of mandamus, but only in a limited class of cases, while permitting the lower courts to issue the writ of mandamus only when jurisdiction is otherwise acquired, although both the Supreme Court and the lower courts could issue an original writ of habeas corpus in a limited class of cases.

The reasons for these various limitations can readily be inferred from the legislative history of the Judiciary Act, as described by Charles Warren in his definitive article, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49 (1923):

> "The fact is that the final form of the Act and its subsequent history cannot be properly understood, unless it is realized that it was a compromise measure, so framed as to secure the votes

> of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction." 37 Harv. L. Rev. at 53.

Although the original drafts of the bill, Senate 1, which ultimately became the Judiciary Act, were expected to create a broad lower court jurisdiction, 37 Harv. L. Rev. at 60-62, the bill as reported from committee was much more narrow, apparently so that the principal draftsman, Oliver Ellsworth, could obtain "the concurrence of Richard Henry Lee in reporting the Bill." 37 Harv. L. Rev. at 62. Lee "was probably picked for that duty for tactical, political reasons, in order to strengthen the measure with the anti-Federal faction." 37 Harv. L. Rev. at 63. Warren comments with respect to Senate 1 that:

> "Evidently, at some stage in the drafting of the Bill, a contest had been waged between those men who wished to confine the Federal judicial power within narrow limits and to leave to the State Courts the chief part of original jurisdiction, and those men who wished to vest in the Federal Courts the full judicial power which the Constitution granted. . . . The former faction prevailed. . . ." 37 Harv. L. Rev. at 62.

However, the original language of Section 14 of the bill (also Section 14 of the Act), even in the narrow form drafted by Ellsworth and reported by Lee, was too broad for the Senate. The express power to issue a writ of "subpoena and protection for wit-

nesses" was stricken out after the word "scire facias." 37 Harv. L. Rev. at 95. Since the writ of protection, allowing a witness to be immune from state civil and criminal process, see, *e.g., Chanler* v. *Sherman,* 162 Fed. 19 (2d Cir. 1908), might intefere with the operation of the state courts, the amendment to Section 14 was entirely consistent with the other limitations intended to narrow the occasions for the issuance of writs.

This Court's decision in *M'Clung* v. *Silliman,* when placed in the context of the legislative history described by Warren, is plainly in full accord with the intentions of the Congress which passed the original All Writs Act.

Since the *M'Clung* decision in 1821, the law has been "well established that a United States district court, outside of the District of Columbia, does not have jurisdiction to issue the writ of mandamus." *United States ex rel. Barmore* v. *Miles,* 177 F. Supp. 172, 173 (W. D. Mich. 1959). The courts of the District of Columbia, having all the common law powers of courts of general jurisdiction of the State of Maryland as of 1801, are unique in having the power to issue an original mandamus. *Kendall* v. *United States,* 12 Pet. 524, 622-25.

The limitation upon the mandamus jurisdiction does not depend upon whether an original action in mandamus is or is not a "civil action."

Certain language in earlier decisions might seem to place significance on the special nature of manda-

mus, but that classification has never been central to the existence of the limitation.

In *M'Intire* v. *Wood,* 7 Cranch 504, the brief opinion of the Court by Mr. Justice Johnson may be read to imply that an expansion of the circuit court jurisdiction provided by Section 11 of the Judiciary Act of 1789, 1 Stat. 78, might result in an expansion of the mandamus jurisdiction. That interpretation is, however, foreclosed by the decision in *M'Clung* v. *Silliman,* 6 Wheat. 598, involving the same claim litigated in *M'Intire* v. *Wood.* The *M'Clung* case, however, involved parties who were citizens of different states and therefore "competent parties in the circuit court" under the existing diversity jurisdiction. 6 Wheat. at 600. The Court deciding *M'Clung,* in an opinion also written by Mr. Justice Johnson, declined to hold that there was any difference required by the different ground on which jurisdiction was based and held that in both cases the decisive element was "that the Circuit Court did not possess the power to issue the mandamus moved for." 6 Wheat. at 601. The limitation, as declared in *M'Clung* v. *Silliman,* depends upon the language of the All Writs Act, and not upon the language of the general jurisdictional statutes. Changes in the language of those jurisdictional statutes, from the original Judiciary Act of 1789 to the present Judicial Code of 1948, do not change the limitation.

This Court has adhered to the rule through successive changes in the wording of the original Judiciary Act. In *Rosenbaum* v. *Bauer,* 120 U.S. 450, the Court

considered the effect of Sections 1 and 2 of the Act of March 3, 1875, 18 Stat. 470, which created a general federal question jurisdiction, and held that prior decisions, including *M'Clung* v. *Silliman,* 6 Wheat. 598, were still binding. In *Knapp* v. *Lake S. & M.S. Ry.,* 197 U.S. 536, the Court rejected an argument that a change in the doctrine was required either by changes in the language of the jurisdictional statutes or "in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby." 197 U.S. at 541. Since both the adoption in 1937 of Fed. R. Civ. P. 81(b) and the 1948 revision of the Judicial Code, "the courts have adhered to the view that Congress has not vested in the district courts original jurisdiction in cases of mandamus, without any suggestion that the revised jurisdictional phraseology wrought any change." *Marshall* v. *Crotty,* 185 F.2d 622, 627 (1st Cir. 1950).

The absence of jurisdiction in a United States District Court to issue an order to compel inspection of corporate records has been recognized in all diversity actions involving facts similar to those of the instant case. *Newark Morning Ledger Co.* v. *Republican Co.,* 188 F. Supp. 813, 814 (D. Mass. 1960); *Selman* v. *Colborn,* 143 F. Supp. 112, 113 (S.D.N.Y. 1956); *Rosen* v. *Alleghany Corp.,* 133 F. Supp. 858, 864-65 (S.D.N.Y. 1955); *Breswick & Co.* v. *Briggs,* 136 F. Supp. 301, 303-304 (S.D.N.Y. 1955).

In each of those cases, the plaintiff sought an order to compel inspection of corporate records of the

defendant. In each case, the court determined that the order requested was in the nature of a writ of mandamus. In each case the court then denied relief on the ground that a United States District Court lacked jurisdiction to issue an order. *Accord, Greenough* v. *Independence Lead Mines Co.,* 45 F.2d 659, 660 (D. Idaho 1930) (alternative holding).

Furthermore, this Court and the courts of appeals have consistently held that the limitation cannot be avoided through the use of an injunction in lieu of a writ of mandamus. A district court could not "make a writ of injunction serve the purpose of a writ of mandamus. . . . What the court was without the power to do directly, it was without the power to do indirectly." *Fineran* v. *Bailey,* 2 F.2d 363 (5th Cir. 1924). The limitation on the issuance of mandamus "is one of substance, and not merely of form." *Smith* v. *Bourbon County,* 127 U.S. 105, 112.

II. Congress has repeatedly recognized and confirmed the statutory limitation on district court jurisdiction in mandamus, most recently in 1962 when both Houses explicitly referred to the rule but Congress created new jurisdiction only with respect to relief against federal officials.

Congress has long recognized and acquiesced in the consistent judicial interpretation since 1821 of the All Writs Act to exclude district court jurisdiction of original actions in the nature of mandamus.

Congress has repeatedly reenacted Section 14 of the original Judiciary Act, with various changes in phraseology and some changes in substance, but without creating original jurisdiction in mandamus. Compare the original section, 1 Stat. 81-82 (*supra* at p. 2), with Rev. Stat. § 716 (1875), and 36 Stat. 1162 (1911), and the present 28 U.S.C. § 1651(a); see Reviser's Note to 28 U.S.C. § 1651 (1964). These reenactments bring the All Writs Act squarely within the class of statutes which Congress has reenacted without amending a particular section previously construed by the courts, thus requiring the courts to "assume that it [Congress] has been satisfied with, *and adopted,* the construction given to its enactment by the courts." *Electric Storage Battery Co.* v. *Shimadzu,* 307 U.S. 5, 14. (Emphasis added.)

Nor can there be any argument that Congress was not aware of the limitation. When Congress has desired that original mandamus be available to litigants, Congress has specifically so provided by creating district court "jurisdiction" to issue the writ of mandamus. But no general jurisdictional statute of this type was enacted until 1962. Instead, the successive grants of jurisdiction to the district courts have been narrowly framed to deal with specific rights and specific classes of cases.

For example, no general mandamus jurisdiction has been created with respect to rights and obligations under the Interstate Commerce Act. Instead, Congress has at various times provided that the "district courts

of the United States shall have jurisdiction . . . to issue a writ or writs of mandamus" to enforce various parts of the Act. Compare the following sections of the Interstate Commerce Act: (1) 25 Stat. 855, 862 (1889), as amended, 56 Stat. 301 (1942), 49 U.S.C. § 23 (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to command carriers to provide equal facilities to shippers; (2) 34 Stat. 584, 594-95 (1906), as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to enforce "this chapter" of the Act;* and (3) 37 Stat. 701, 703 (1913), as amended, 41 Stat. 493 (1920), 49 U.S.C. § 19a(*l*) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" commanding compliance "with the provisions of this section."

The 1906 amendment, 34 Stat. 584, 594-95, as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), is typical of the creation of district court jurisdiction in mandamus in specific classes of cases. In *Knapp* v. *Lake S. & M.S. Ry.*, 197 U.S. 536, this Court had construed Section 6 of the Interstate Commerce Act, creating jurisdiction in mandamus to enforce the filing by a common carrier of its tariffs. The Court had held that Section 6 did not confer

* The words "said Act" in 34 Stat. 594-95 were changed to "this part" by 49 Stat. 543; the editors of the United States Code have "translated" the words "this part" to read "this chapter." See Historical Note to 49 U.S.C.A. § 20, par. (9) (1951).

jurisdiction in mandamus to enforce compliance with Section 20, which provides that the Commission may require annual reports from carriers. Following the decision in the *Knapp* case in 1905, Congress amended the Act in 1906, creating in the district courts jurisdiction to enforce the requirements of Section 20. The Congress did not, however, create jurisdiction in mandamus to enforce the entire Interstate Commerce Act, much less a general jurisdiction in mandamus.

Furthermore, Congress as recently as 1962 has specifically considered the rule laid down in the prior decisions and has determined to amend the Judiciary Act only with respect to jurisdiction in mandamus against federal officers and agencies. Congress recognized that the limitation of mandamus jurisdiction to the district courts of the District of Columbia acted as an inconvenience to private litigants seeking relief against actions of the federal Government. By Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964), Congress provided that:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Under this section, orders in the nature of mandamus may be granted against officers of the United States by any district court. If Congress had intended to create a general jurisdiction in original mandamus,

Congress could easily have done so merely by providing that "the district courts shall have original jurisdiction of any action in the nature of mandamus."

There can be no doubt that the Congress in 1962 intended to continue the existing limitation, since that limitation was specifically brought to the attention of both Houses prior to the enactment of the amendment. The report of the House Judiciary Committee, H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961), to accompany H.R. 1960, which became Public Law 87-748, stated at page 2:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus. Nor has the abolition of mandamus by rule 81(b) of the Federal Rules of Civil Procedure altered this jurisdictional limitation, since the Federal rules did not change either the substance of the relief which the district courts could grant or the cases over which they had jurisdiction.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia."

Identical language appears in H.R. Rep. No. 1936, 86th Cong., 2d Sess. 2 (1960), which accompanied H.R. 12622. That bill, identical with H.R. 1960 as it passed the House in the 87th Congress, passed the House near the end of the second session of the 86th Congress on August 30, 1960, 106 Cong. Rec. 18405, but was never acted upon by the Senate.

Senate Report No. 1992, 87th Cong., 2d Sess. 2 (1962), to accompany H.R. 1960, contains language substantially identical with the two earlier House Reports:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia. This court, in addition to being a Federal court, is also charged with the enforcement of domestic law. Its jurisdiction is derived not only from title 28 but also from the laws of the State of Maryland, which governed the area ceded to the District of Columbia in 1801. That body of law included jurisdiction to issue writs of mandamus in original proceedings."

When H.R. 1960 was passed by the Senate, with amendments, on September 6, 1962, Senator Mansfield received unanimous consent, "to have printed in the RECORD an excerpt from the report (No. 1992), explaining the purposes of the bill." The excerpt as printed includes the language quoted above. 108 Cong. Rec. at 18783.

The statement that "the single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of

Columbia," thus appeared in at least three Congressional committee reports and was printed once in the Congressional Record.

The long and consistent legislative history of specific enactments to create district court jurisdiction in mandamus, culminating in the 1962 Amendment to the Judicial Code, establishes that the limitation on mandamus contained in the original Judiciary Act has been continued by Congress. Under these circumstances, that jurisdiction should not be expanded except by statute, enacted after appropriate consultation and deliberation by both the Judicial Conference, pursuant to the mandate of 28 U.S.C. § 331 (1964), and the responsible Congressional committees.

III. The remedies available in the district courts to litigants in diversity cases continue to be subject to the plenary power of Congress to limit the district court jurisdiction.

Petitioner and the dissenting judge in the court of appeals suggest that the decisions in *Erie R.R.* v. *Tompkins,* 304 U.S. 64, and *Guaranty Trust Co.* v. *York,* 326 U.S. 99, require that a federal court in a diversity case grant the same remedies which would be available in a state court, even if the federal court would otherwise have no power to do so.

That suggestion is not supported by the language of *Guaranty Trust Co.* v. *York.* Mr. Justice Frankfurter there stated for the Court:

> "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts." 326 U.S. at 106. (Footnote omitted.)

With respect to equitable relief, Mr. Justice Frankfurter noted that:

> "In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.
>
> "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions. . . ." 326 U.S. at 105.

In describing those restrictions, Mr. Justice Frankfurter noted that "explicit Congressional curtailment of equity powers must be respected, see, *e.g.*, Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*" 326 U.S. at 105.

Nor is petitioner's suggestion supported by the reasoning of the *Erie* decision.

Looking first to the statutory basis of the *Erie* doctrine, 304 U.S. at 71-77, *M'Clung* v. *Silliman*, 6 Wheat. 598, was decided long before *Swift* v. *Tyson*,

16 Pet. 1, and does not depend upon any particular interpretation of the Rules of Decision Act. As originally enacted, section 34 of the Judiciary Act of 1789, 1 Stat. 92 (1845), the Rules of Decision Act provided:

> "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."*

Even if the general language of the Rules of Decision Act would make state remedies available to the federal courts determining diversity cases, the qualifying language, "except where the Constitution, treaties or statutes of the United States otherwise require or provide," gives effect to the limitations of the All Writs Act, since that Act, together with other portions of the Judicial Code, does so provide.

Nor does the constitutional ground of the *Erie* decision, 304 U.S. at 77-80, require the adoption by the federal district courts of state standards with respect to remedies in the nature of mandamus. The vice described by Mr. Justice Brandeis in the *Erie* opinion was the use of a federal general common law to achieve

* As now codified, 28 U.S.C. § 1652 (1964), the Rules of Decision Act states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

a substantive result on the merits which would be different from the result obtainable in a state court. 304 U.S. at 74-78. In the instant case the district court has dismissed for lack of jurisdiction over the subject matter, leaving plaintiff free to pursue his remedies in the state courts. The lack of original jurisdiction in mandamus does not change the result on the merits, as in *Swift* v. *Tyson,* nor does the lack of original jurisdiction in mandamus produce a result similar to that in *Guffey* v. *Smith,* 237 U.S. 101, in which the federal remedy in equity was held to extend to a case in which the state courts would have withheld equitable relief.

On the other hand, a holding that the federal courts must entertain diversity cases in which mandamus is the only relief sought, despite the Congressional intention to the contrary, would directly contradict prior decisions concerning the plenary power of Congress over the jurisdiction of the courts.

This Court has consistently held, as in *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234, that:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or *restrict* such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." (Emphasis added.)

In *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R.R.,* 321 U.S. 50, the Court held that the railroad

had not sufficiently performed all prerequisites to relief under the Norris-LaGuardia Act, 47 Stat. 70, and was therefore barred from obtaining injunctive relief in the federal courts. The Court noted that other remedies were available and held that the railroad's failure to observe the requirements of Section 8 of the Norris-LaGuardia Act had

> "deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts,[21] has seen fit to withhold. With the wisdom of that action we have no concern." 321 U.S. at 63-64.

Footnote 21 in the *Toledo* decision cites *Lockerty* v. *Phillips,* 319 U.S. 182, in which the Court construed the provisions of the Emergency Price Control Act, 56 Stat. 23. Section 204(d) of the Act created equity jurisdiction to restrain the enforcement of price control orders under the Act in the Emergency Court of Appeals and in the Supreme Court upon review of decisions of the Emergency Court, and withdrew that jurisdiction from every other federal and state court. In discussing this limitation, Mr. Chief Justice Stone for a unanimous Court compared the limitation on equity jurisdiction thus created with the limitation on jurisdiction in original mandamus first recognized in *M'Intire* v. *Wood,* 7 Cranch 504, 506:

> "There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal

courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234, and cases cited; *McIntire* v. *Wood,* 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' *Cary* v. *Curtis,* 3 How. 236, 245;. . . ." 319 U.S. at 187. (Remaining citations omitted.)

All these limitations on jurisdiction result from the same basic Congressional power over the jurisdiction of the lower federal courts. The limitations in the Norris-LaGuardia Act and in the Emergency Price Control Act result from identifiable Congressional policies and are perhaps more easily understood than the Congressional refusal to create a general district court jurisdiction in original mandamus. But that Congressional refusal is as plain as the explicit declarations of policy in the other statutes which also expressly limit jurisdiction and the result should be the same.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 486.—October Term, 1967.

J. David Stern, Petitioner, v. South Chester Tube Co. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April 22, 1968.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, a resident of New York, who owned stock worth $10,000 or more in the respondent South Chester Tube Company, a corporation, brought this action in the United States District Court for the Eastern District of Pennsylvania, where respondent was incorporated and maintained its business headquarters. Alleging that the corporation had many times denied petitioner's requests to inspect its books and records as authorized by 15 Pa. Stat. § 2852–308B,[1] the complaint requested the court to enter an order directing the corporation to permit such an inspection. Jurisdiction was invoked under 28 U. S. C. § 1332 (a), which vests jurisdiction in the district courts where the matter in controversy exceeds the sum of $10,000 and where the parties are citizens of different States. The respondent answered, admitting parts of the allegations of the complaint and denying others. Respondent also moved to dismiss the action for lack of jurisdiction of the subject matter on the two following grounds:

"1. The only relief sought in this diversity action is an order to compel the defendant company to

[1] "Every shareholder shall have the right to examine, in person or by agent or attorney, at any reasonable time or times, for any reasonable purpose, the share register, books, or records of account, and records of the proceedings of the shareholders and directors, and make extracts therefrom."

allow the plaintiff, a minority shareholder, to inspect certain corporate records. Such an order is in the nature of a writ of mandamus. Under the All Writs Act, this United States District Court does not have jurisdiction to issue an order in the nature of a writ of mandamus in a case in which that writ is the only relief sought.

"2. . . . That right of inspection is not subject to any monetary valuation. Since diversity jurisdiction depends on the existence of an amount in controversy which is capable of such monetary valuation [in excess of $10,000], no jurisdiction exists in this Court."

The District Court dismissed on the first ground of the motion, 252 F. Supp. 329 (D. C. E. D. Pa. 1966), and the Court of Appeals affirmed on the same ground, 378 F. 2d 205 (3d Cir. 1967). For reasons to be stated we hold that these rulings on the mandamus point were erroneous and reverse the judgment below.

The courts below viewed petitioner's complaint as in effect a plea for a writ of mandamus and relied on a long line of cases which have interpreted the All Writs Act,[2] to deny power to issue this writ when it is the only relief sought. A writ of mandamus, so these cases hold, can issue only in aid of jurisdiction acquired to grant some other form of relief. See *M'Intire* v. *Wood*, 7 Cranch 504 (1813); *Rosenbaum* v. *Bauer*, 120 U. S. 450 (1887); *Covington Bridge Co.* v. *Hager*, 203 U. S. 109 (1906). We think, however, that the courts below erred in concluding that the relief sought here is "mandamus" within the meaning of these cases. Practically all the cases relied on by respondent and the courts below involved

[2] 1 Stat. 81 (1845), as amended, 28 U. S. C. § 1651 (a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

mandamus in its original sense—a suit against a public officer to compel performance of some "ministerial" duty. Although the word "mandamus" is also frequently used to describe orders that compel affirmative action by private parties, the considerations that come into play here certainly differ from the problems involved when the courts seek to compel action by public officials.

So far as we are aware, there is only one case in which this Court has held a federal district court without jurisdiction to issue a writ of mandamus against a private party. In *Knapp* v. *Lake Shore R. Co.*, 197 U. S. 536 (1905), the Interstate Commerce Commission had filed a "petition for mandamus" in the federal court, seeking to compel a railroad company to file certain reports as required by § 20 of the Interstate Commerce Act. The Court applied the principle of the earlier cases involving public officers and held that mandamus would not lie against the railroad company defendant. But the Court was careful to note that relief against the railroad might be available in the form of a "writ of injunction or other proper process, mandatory or otherwise." *Id.*, at 543. The distinction drawn by the Court in *Knapp* between mandamus and a mandatory injunction seems formalistic in the present day and age, but it must be remembered that *Knapp* was decided before the simplification of the rules of pleading and, more importantly, before the merger of law and equity. Since a writ of mandamus could be issued only in an action at law, while an injunction, whether mandatory or prohibitive, was an equitable remedy, the distinction referred to in *Knapp* was a familiar one in the judicial system of the time.

We need not now decide whether *Knapp* properly extended the mandamus bar to suits for relief against private parties or even whether the distinction between mandamus and mandatory injunctions can survive the merger of law and equity and the simplification of the

rules of pleading. For in the present case petitioner did not even fall into the trap of using the possibly fatal label, "mandamus"; instead he simply asked the Court "to order the defendant to permit plaintiff to examine [its records]." Thus, even under the broadest possible reading of the *Knapp* decision, the All Writs Act would not deny a federal court power to issue the relief sought here.

We find no other principle of federal law, whether judge-made, statutory, or constitutional, which bars the granting of a mandatory remedy here. Petitioner undoubtedly has a right, under the substantive law of the State, to inspect the records of the corporation in which he holds stock, and since he has no adequate remedy at law, the federal court has jurisdiction to grant relief under its traditional equity power. We need not decide whether this is a case where such a federal remedy can be provided even in the absence of a similar state remedy, *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 674 (1950); cf. *Guffey* v. *Smith*, 237 U. S. 101 (1915), because it is clear that state law here also provides for enforcement of the shareholder's right by a compulsory judicial order. See 12 Pa. Stat. § 1911. While the State labels the right of action "mandamus," what the Pennsylvania statute actually does is to authorize an action to compel Pennsylvania corporations to permit inspection of their records by their shareholders, and the label used under state practice of course has no bearing on the question whether the federal courts have power to grant the kind of relief actually sought. Consequently the District Court here does have power to issue the proper orders to enforce petitioner's state-granted right to inspect the corporate records.

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.